IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.T.SANKARAN

THURSDAY, THE 22ND NOVEMBER 2007 / 1ST AGRAHAYANA 1929

Crl.MC.No. 5637 of 2003

AGAINST THE PROCEEDINGS IN CRL.R.P.NO.18 OF 2003 ON THE FILE OF THE SESSIONS COURT, KOTTAYAM AND THE PROCEEDINGS IN C.C.NO.555 OF 2002 OF JUDICIAL FIRST CLASS MAGISTRATE COURT II, KANJIRAPPALLY.

PETITIONERS: REVISION PETITIONERS/ACCUSED:
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1. PREETHIMON, AGED 30, RESIDING AT
   SANNIDHANAM HOUSE, PEROORTHODU KARA,
   ERUMELY SOUTH VILLAGE.

2. SUGATHAN, AGED 18, RESIDING AT
   VATTACHAL PUTHENPARAMBIL HOUSE,
   KARIMKALLUMOOZHY BHAGOM, ERUMELY KARA,
   ERUMELY SOUTH VILLAGE.

BY ADV. SRI.K.RAMAKUMAR

RESPONDENT: RESPONDENT: COMPLAINANT:

STATE OF KERALA REPRESENTED BY THE
SUB INSPECTOR OF POLICE, ERUMELY,
THROUGH PUBLIC PROSECUTOR, HIGH COURT OF
KERALA, ERNAKULAM.

BY PUBLIC PROSECUTOR SRI.K.G.BHASKARAN

THIS CRIMINAL MISC. CASE HAVING BEEN FINALLY HEARD ON 20/11/2007, THE COURT ON 22/11/2007 PASSED THE FOLLOWING:

CRL.M.P.NO.13696/2003 IN CRL.M.C.NO.5637/2003

DISMISSED

22/11/2007 SD/- K.T.SANKARAN, JUDGE

//TRUE COPY//

AHZ/

K.T. SANKARAN, J.

CRL.M.C.NO. 5637 OF 2003

Dated this the 22nd day of November, 2007

O R D E R

The petitioners are the accused persons in C.C.No.555 of 2002, on the file of the Court of the Judicial Magistrate of the first class II, Kanjirapally. The offences alleged against them are under Sections 448, 294(b) and 506(1) read with Section 34 of the Indian Penal Code. On appearance before the court below, they filed an application under Section 258 of the Code of Criminal Procedure, which was dismissed by the trial court and the order of the trial court was confirmed in Crl.R.P.No.18 of 2003, on the file of the Court of Session, Kottayam. The prayer in the Crl.M.C is to quash Annexure-B order in Crl.R.P.No.18 of 2003 as well as to quash all the proceedings in C.C.No.555 of 2002, on the file of the Court of the Judicial Magistrate of the first class II, Kanjirapally.

2. It is submitted by the counsel for the petitioner that even if all the allegations contained in Annexure-A FIR are taken as true,

no offence is made out against the petitioners. Accused No.1 is an advocate while accused No.2 is a member of the panchayat. It is stated in Annexure-A FIR that the accused came to the police station and enquired about the petition submitted by Soosan, the wife of the second accused and in respect of which Crime No.206 of 2001 was registered. The further allegation in the FIR is as follows:

3. Sri.K.Ramakumar, learned counsel appearing for the petitioners, submitted that the allegations made in the FIR do not constitute an offence under Section 294(b) of the Indian Penal Code. He relied on the decisions in **Santhilal** v. **Parameswaran Pillai** (1988 (2) KLT Short Notes Case No.112 at page 74), **P.T.Chacko** v. **Nainan Chacko** (1967 KLT 799), **Chacko George** v. **State of Kerala** (1968 KLT 219) and **Ranjit V.Udeshi** v. **State of Maharashtra** (AIR 1965 SC 881) in support of this contention.

4. Section 294 of the Indian Penal Code reads as follows:

> "**294. Obscene acts and songs**:-- Whoever, to the annoyance of others --
>
> (a) does any obscene act in any public place, or
>
> (b) sings, recites or utters any obscene song, ballad or words, in or near any public place,
>
> shall be punished with imprisonment of either description for a term which may extend to three

months, or with fine, or with both."

In order to constitute an offence under Section 294(b), the accused must sing, recite or utter any obscene song, ballad or words, in or near any public place. The question is whether the words allegedly uttered by the accused would constitute obscene words.

5. In **P.T.Chacko** v. **Nainan Chacko** (1967 KLT 799), Justice K.K.Mathew (as His Lordship then was) considered the question whether the words "

" uttered by the first accused would constitute an offence under Section 294(b) and whether those words would be obscene. In paragraph 5 of the judgment it was held thus:

> "5. The only point argued was that the 1st accused has not committed an offence punishable under S.294(b) IPC, by uttering the words above-mentioned. The courts below have held that the words uttered were obscene and the utterance caused annoyance to the public. I am not inclined to take this view. In The Queen v. Hicklin 1868-3-Q.B.360 at 371 Cockburn C.J., laid down the test of 'obscenity' in these words:

> "..... the test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences."
>
> This test has been uniformly followed in India. The Supreme Court has accepted the correctness of the test in *Ranjit D.Udeshi v. State of Maharashtra* AIR, 1965 SC 881 at 887. In *Samuel Roth v. U.S.A.* (1957) 354 U.S. 476, Chief Justice Warren said that the test of 'obscenity' is the "substantial tendency to corrupt by arousing lustful desires". Mr.Justice Harlan observed that in order to be 'obscene' the matter must "tend to sexually impure thoughts". I do not think that the words uttered in this case have such a tendency. It may be that the words are defamatory of the complainant, but I do not think that the words are 'obscene' and the utterance would constitute an offence punishable under S.294(b) IPC."

6. In **Chacko George** v. **State of Kerala** (1968 KLT 219), Justice K.Sadasivan (as His Lordship then was) laid down the test of 'obscenity' as follows:

> "The test of obscenity 'is whether the tendency of the matter charged as obscenity, is to deprave and corrupt those whose minds are open to such immoral influences'. The words uttered must be capable of arousing sexually impure thoughts in the minds of the hearers."

7. In **Ranjit V.Udeshi** v. **State of Maharashtra** (AIR 1965 SC 881), the Supreme Court, while dealing with the question whether the accused persons, who were partners of a book stall committed the offence under Section 292 of the Indian Penal Code (1860) as they were found in possession for the purpose of sale copies of an alleged obscene book called "Lady Chatterley's Lover", considered the test of obscenity, and held thus:

> "..... I think the test of obscenity is this whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall. ... it is quite certain that it would suggest to the minds of the young of either sex, or even to persons of more advanced years, thoughts of a most impure and libidinous character."

8. I am of the view that the words allegedly uttered by the accused cannot be said to be obscene words. I respectfully follow the decisions referred to above.

9. Learned Public Prosecutor submitted that it is also stated in the FIR as follows:

Learned Public Prosecutor laid stress on the word “

and contended that there are allegations in the FIR that the accused persons uttered obscene words. In answer to this contention, Sri.K.Ramakumar submitted that the vague allegation that there was utterance of obscene words in the FIR is not enough to constitute an offence under Section 294(b) IPC.

10. He relied on the decision in **Santhilal** v. **Parameswaran Pillai** (1988 (2) KLT Short Notes Case No.112 at page 74), wherein it was held:

> “It is not stated either in the complaint or sworn statement what the words used were, while alleging an offence under S.294 IPC. Without that, it is not possible for a court to consider whether the offence under S.294 is attracted.”

11. A vague or general statement in the FIR that the accused showered obscene words is not enough to constitute an offence under Section 294(b). It is necessary to state the words uttered by the accused. The prosecution would not be justified in bringing in the evidence for the first time the words allegedly spoken to by the accused, when the same is not recorded in the First Information Statement in a case instituted upon police report. The complaint or the FIR, as the case may be, shall contain the words spoken to by the accused, which, according to the prosecution, would attract the offence under Section 294(b) of the Indian Penal Code. Or else, there is every possibility of evidence being tendered putting forth any words as the prosecution witnesses may wish to put forward improving upon or adding to the allegation in the complaint or FIR causing great prejudice to the accused and depriving his right to have a fair trial.

12. I am of the view that even if all the averments in the FIR are taken as true, no offence under Section 294(b) is made out. Cognizance of offence under Section 294(b) is accordingly, set aside.

13. Learned counsel for the petitioner would also contend that no offence under Section 448 is made out. He submitted that police station being a public place, it cannot be said that the ingredients of Section 441 (criminal trespass) are made out. Section 441 provides that whoever enters into or upon property in the possession of another with intent to commit an offence or to intimidate, insult or annoy any person in possession of such property, or having lawfully entered into or upon such property, unlawfully remains there with intent thereby to intimidate, insult or annoy any such person, or with intent to commit an offence is said to commit criminal trespass. Section 442 provides that whoever commits criminal trespass by entering into or remaining in any building, tent or vessel used as a human dwelling or any building used as a place for worship, or as a place for the custody of property, is said to commit "house trespass". Section 448 provides the punishment for house trespass. I do not agree with the learned counsel for the petitioners that the allegations made in the First Information Report do not make out an offence under Section 448 of the Indian Penal Code. Jurisdiction under Section 482 cannot be invoked to quash the proceedings in this case in respect of the offence under Section 448 of the Indian Penal Code. I am

also of the view that it cannot be said that the allegations in the FIR do not constitute an offence under Section 506(1) IPC. I make it clear that the observations made by me in respect of the offences under Sections 448 and 506(1) are meant only to decide whether jurisdiction under Section 482 can be invoked at this stage.

In the result, the Criminal Miscellaneous Case is partly allowed. The charge against the petitioners, in so far as it relates to the offence under Section 294(b) of the Indian Penal Code, is quashed. The case shall continue against the petitioners only for rest of the offences alleged against them.

(K.T.SANKARAN)
Judge

ahz/

K.T.SANKARAN, J.

Crl.M.C.NO. 5637 OF 2003 D

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22nd November, 2007